

# 2008

Treasury

Department of the

**Internal Revenue Service**

## Instructions for Form 8804-C

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### **General Instructions**

#### **Purpose of Form**

Form 8804-C is a voluntary form used by a foreign partner who chooses to provide a certification to the partnership under Treasury Regulations section 1.1446-6 for reduced or no 1446 tax withholding. The form contains representations the regulations require which the foreign partner is declares are true, correct, and complete.

The foreign partner will use Form 8804-C to certify to the partnership that either it has partner-level deductions and losses that can reduce the required 1446 tax withholding (1446 tax) on its effectively connected taxable income (ECTI) or that its investment in the partnership is its only activity giving rise to effectively connected income, gain, loss or deduction . The foreign partner will also use Form 8804-C to update information previously certified the partnership for the same taxable year.

Each foreign partner who chooses to submit a certificate to the partnership must submit a separate Form 8804-C. Also, a new Form 8804-C is required for each taxable year that a foreign partner chooses to utilize the provisions of Treasury Regulations 1.1446-6.

The partnership may consider Forms 8804-C submitted by its foreign partners in calculating, paying and reporting the section 1446 tax based on ECTI allocable to the foreign partner. Consideration of these certificates may reduce or eliminate the partnership's obligation to pay 1446 tax based on the deductions and losses the partner certifies to the partnership. There is also a de minimis exception to the partnership paying 1446 tax. A partnership need not withhold 1446 tax on a partner if the partner certifies that its investment in the partnership is its only activity giving rise to effectively connected income, gain, loss or deduction, and the partnership estimates that the annualized (or, in the case of a partnership completing its Form 8804, the actual) 1446 tax otherwise due for that partner is less than \$1,000, without taking into account any deductions or losses certified by the partner to the partnership or any state and local taxes the partnership withholds on behalf of the partner.

#### **Who Must File**

A partner's submission and use of Form 8804-C is voluntary. It is used if the foreign partner chooses to provide a certification to the partnership under Treasury Regulations

section 1.1446-6 for reduced or no 1446 tax withholding. The foreign partner will be certifying to the partnership that it meets all the requirements of the regulations and represents that the information provided, including filing requirements is true, correct and complete.

A partnership's consideration of Form 8804-C is also voluntary. However, a partnership that considers the certificate in calculating its 1446 tax must submit the certificate to the IRS as explained in "When to File".

### **When to Submit a Form 8804-C Certificate**

A partner may submit an original certificate any time during the partnership's year and up to when the partnership files its Form 8804.

### **When to File**

A partnership must pay 1446 tax in installments using Form 8813. The first installment period that a partnership considers an original or updated Form 8804-C in calculating an installment payment of 1446 tax, it must attach a copy of that form to the Form 8813. For all subsequent installment periods for which the partnership considers that same Form 8804-C, the partnership may, instead of attaching the partner's Form 8804-C, attach to Form 8813 a list containing the name, TIN, the amount of certified deductions and losses, and the amount of state and local taxes the partnership may consider under paragraph (c)(1)(iii) of this section for each foreign partner whose certificate was relied upon. For purposes of the preceding sentence, if the partnership is relying on a de minimis certification received the partner, instead of providing the amounts described in the prior sentence, it should attach a statement to Form 8813 which provides that, relying on that certificate, no 1446 tax is due with respect to that partner.

In all events, Form 8804-C must be attached to the annual filing of Form 8805. The partnership must also attach a the computation of the 1446 tax due with respect to such partner, to all Forms 8813 and Forms 8805 filed with the IRS for any installment period or year for which such certificate is considered in computing the partnership's 1446 tax.

A partnership that relies in whole or in part on a Form 8804-C received from a partner when computing its 1446 tax due with respect to such partner must file Form 8813 or Form 8804 and 8805, whichever is applicable, for the period for which the Form 8804-C is considered, even if as a result of relying on the certificate no 1446 tax (or an installment of such tax) is due with respect to such foreign partner.

The partnership will also furnish Form 8804-C with the 8805 to the IRS and such foreign partner even if no 1446 tax is paid on behalf of the partner. The partnership must include in that computation the amount of state and local taxes described in paragraph (c)(1)(iii) of this section taken into account in computing the 1446 tax due with respect to that partner. The partnership must also attach a computation of the 1446 tax due with respect to a partner for whom only state and local taxes described in paragraph (c)(1)(iii) are taken into account.

## General Information

If this is the 1<sup>st</sup> certificate ever submitted by the partner for a taxable year, check here [  ]

Check the box only if the partner is submitting a Form 8804-C for the first time, and has never submitted a certificate to any partnerships under these regulations for any taxable year.

If a certificate was previously submitted for a different tax year, enter the tax year that the first certificate was first submitted. [ \_\_\_\_\_ ]

If applicable, enter the tax year when the foreign partner first submitted a certificate under these regulations to the partnership, for example, "2008".

If the partner is submitting an updated certificate, check here [  ]

See Form 8804-C line 5 for the circumstances when an updated certificate is required.

## Specific Instructions

### Section A – Partner Information

**Foreign Partner's Name** - Enter the foreign partner's name. If the partner is an individual enter last name, first name. For all other types of partners, enter the complete and official business name. If a "c/o" or another person's name is necessary, insert that information in the address line.

**Taxpayer Identification Number (TIN)** - Enter the foreign partner's TIN using the correct format. Individual foreign partner will use the nnn-nn-nnnn format, for example 123-45-6789, while other foreign partners such as corporations and partnerships will use the NN-NNNNNN format, for example, 12-3456789.

**Date of Certification** - Enter the date when the foreign partner provides the certificate (Form 8804-C) to the partnership. Use the DD/MM/YYYY format, for example, 09/22/2008.

**Number, street, and room no. or suite no. if a P.O. Box.** – Enter the foreign partner's complete street address.

**Note:** When providing a U.S. address on Form 8804-C, include the suite room, or other unit number after the street address. If the Post Office does not deliver mail to the street address and the foreign partner has a P.O. Box, show the box number instead of the street address. If the partner receives its mail in care of a third party (such as an accountant or attorney) list that information here.

City, State and Zip Code – Enter the foreign partner’s city, or providence if it’s a foreign address. Include the zip code. If applicable, enter the foreign zip code and foreign country code.

### **Section B – Partnership Information**

Partnership’s Name - Enter the partnership name. If a “c/o” or another person’s name is necessary, insert that information in the address line below.

Employer Identification Number (EIN) - Enter the partnership’s EIN using the correct format. For all partnerships the format is: NN-NNNNNNN, for example, 12-3456789.

Date of Certification - Enter the date when the foreign partner provides the certificate (form 8804-C) to the partnership. Use the DD/MM/YYYY format, for example, 09/22/2008.

Number, street, and room no. or suite no. if a P.O. Box. – Enter the foreign partner’s complete street address.

Note: When providing a U.S. address on Form 8804-C, include the suite room, or other unit number after the street address. If the Post Office does not deliver mail to the street address and the partnership has a P.O. Box, show the box number instead of the street address. If the partnership receives its mail in care of a third party (such as an accountant or attorney) list that information here.

### **Section C – Partner Representations**

Line 1a - A partner must represent that its certificate is not being submitted to a publicly traded partnership. A publicly traded partnership is any partnership an interest in which is regularly traded on an established securities market or is readily tradable on a secondary market. These rules do not apply to a publicly traded partnership treated as a corporation under section 7704 of the Internal Revenue Code.

Line 1b - The only type of trust that may submit a certificate to a partnership is a grantor trust. "Grantor trust" is a term used in the Internal Revenue Code to describe any trust over which the grantor or other owner retains the power to control or direct the trust's income or assets. A grantor trust may submit a certificate if the grantor or other owner of the trust has submitted the certificate and has met the documentation requirements of §1.1446-1.

2a Estimated tax is used to pay both income tax and self-employment tax, as well as other taxes and amounts reported on your tax return. If you do not pay enough through withholding or estimated tax payments, you may be charged a penalty. If you do not pay enough by the due date of each payment period you may be charged a penalty even if you are due a refund when you file your tax return. For more information see Forms 2210 and 2220. \_

2b The character of a loss includes whether the loss is ordinary or capital and whether or not it is passive.

2c The documentation a partner might provide under Treasury Regulation § 1.1446-1 to the partnership to determine its status includes Form W-8BEN, "Certificate of Foreign Status of Beneficial Owner," and Form W-8 ECI "Certificate of Foreign Person's Claim that Income is Effectively Connected With the Conduct of a Trade or Business in the United States,".

Lines 3a and 3b - The following examples illustrate the representations these lines require.

Example (1) - A foreign individual (NRA) and a U.S. individual (B) form a partnership (PRS) in 2008 to conduct a trade or business in the United States. NRA and B provide PRS appropriate documentation under §1.1446-1 to establish their status for purposes of section 1446. NRA submits a certificate to PRS (using Form 8804-C) on July 22, 2008, to be considered by PRS in determining its 1446 tax due with respect to NRA for the third installment period in the 2008. The Form 8804-C states that NRA reasonably expects to have an effectively connected net operating loss of \$5,000 available to offset his allocable share of ECTI from PRS in 2008. Prior to 2008, NRA had not submitted a certificate to a partnership. NRA filed his 2005 U.S. federal income tax return on March 13, 2007; his 2006 U.S. federal income tax return on February 12, 2008; his 2007 U.S. federal income tax return on April 13, 2008. NRA will file his 2008 U.S. federal income tax return on May 14, 2009. NRA paid or (will pay) all amounts due with respect to the returns (including interest, penalties, and additions to tax, if any) by the date they are filed. NRA's 2005 through 2007 U.S. federal income tax returns report income or gain effectively connected with a U.S. trade or business or deductions or losses properly allocated and apportioned to such activities.

Because this is NRA's first taxable year for which he is submitting a certificate to any partnership (regardless of whether he was a partner in PRS or any other partnership during each of these years), he must meet the following requirements:

- (i) his U.S. federal income tax return for the 2007 taxable year has been (or will be) timely filed, including extensions he obtained;
- (ii) his U.S. federal income tax return for the 2005 and 2006 taxable years were filed by the earlier of:
  - (1) The date that is one year after the due date set forth in section 6072(c) for such return, not including any extensions of time to file; or
  - (2) The date on which this certificate is submitted to the partnership;
- (iii) all amounts due with each return (including interest, penalties, and additions to tax, if any) were (or will be) paid on or before these dates.

While NRA's 2005 and 2006 U.S. federal income tax returns were filed after their due dates, they were filed within one year of the due date and before NRA submitted his

certificate to PRS. In addition, NRA will timely file his 2008 U.S. federal income tax return the return on February 12, 2008. Finally, all amounts due with each return (including interest, penalties, and additions to tax, if any) were (or will be) paid on or before these dates. Therefore, NRA is eligible to submit a certificate to PRS.

Example (2) – Assume the same facts as Example (1) except NRA had submitted a certificate to another partnership in 2005. Under these circumstances NRA was required to have timely filed his U.S. federal income tax return for 2005 and all subsequent taxable years. Because NRA did not timely file his 2005 U.S. federal income tax return (or for that matter his 2006 U.S. federal income tax return), he is ineligible to submit a certificate to PRS.

Line 4a – As of the time of submission of this certificate, I have not filed the following U.S. federal income tax returns. – A foreign partner submitting a 8804-C to the partnership must list all returns that have not been filed. The information is entered on the line provided so that such return not filed at the time of the Form 8804-C submission can be identified and listed.

Example - A foreign partner elects to submit a Form 8804-C to its U.S. partnership on March 31, 2008, but has not yet filed its U.S. federal income tax return for 2007. The foreign partner will disclose the non filing of the 2007 U.S. federal income tax return on line 4a as follows:

Return Form: 1040NR

Tax Year Ended: December 31, 2007

Filing Due Date: June 15, 2008.

Line 5: Check the following reason(s) that apply for filing an updated certificate. Check the appropriate box(es) when any of these event occur:

(a) The certificate I submitted to the partnership for this taxable year listed a prior taxable year U.S. federal income tax return that I had not yet filed. I have now filed this tax return and am submitting this updated certificate to inform the partnership that the return has been filed, which must be done within 10 days of the return's filing. Complete Part I Line 4a and substitute the date filed for the filing due date.

(b) The certificate I submitted to the partnership for this taxable year listed a prior taxable year U.S. federal income tax return that I had not yet filed. I am submitting this updated certificate to the partnership prior to its final installment due date of 1446 tax (see instructions for details). Complete Part I, line 4a and include any extension of time in the filing due date.

Note: - The partnership's installment due dates of 1446 tax are the 15<sup>th</sup> day of the 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, and 12<sup>th</sup> months of its taxable year. For calendar year partnerships these correspond to the 15<sup>th</sup> day of April, June, September, and December. A partner must inform the partnership before the partnership's final installment due date if the partner will not have filed a prior year's income tax return by that date.

(c) The amount or character of the deductions and losses listed on the most recent certificate I submitted to the partnership has changed and I am informing the partnership, which must be done within 10 days of making that determination. Complete all three columns of Part II line 7.

(d) I previously certified to the partnership that, for this taxable year, my investment in the partnership was my only activity giving rise to effectively connected income, gain, loss or deduction. I am informing the partnership that this certification is no longer accurate, which must be done within 10 days of this change.

(e) Other information on the most recent certificate I submitted is incorrect. Provide the corrected information on this updated certificate and attach a statement identifying the information being corrected.

**Part II – Certification of Deductions and Losses under Regulations section 1.1446-6(c)(1)(i)** – In this section the foreign partner will make representations about the character and amounts of its eligible deduction and losses to offset its allocable share of effectively connected taxable income. The foreign partner is also be required to make entries listing the amounts and character of the eligible deductions and losses.

Line 6 - The deduction and losses set forth in this certificate are described in Regulations section 1.1446 (c)(1)(i) -

Line 7 – The deduction and losses set described in Regulations section 1.1446-6 (c)(1)(i) that I reasonably expect to be available to reduce my U.S. income tax liability on my allocable share of effectively connected income or gain from the partnership for this tax year are: Enter the amount of the eligible deduction and losses that are being represented to the partnership in the appropriate line. The character of the deduction and losses will determine where the entry will be made.

Line 7a – Net operating loss carryover – For foreign partners - the NOL must be connected with gross income which is effectively connected (or treated as effectively connected) with conduct of the partner's trade or business in the United States.

For partnerships, the regulations provide that a partnership may not consider a partner's net operating loss (NOL) deduction in an amount greater than 90 percent of the partner's allocable share of ECTI. The 90 percent limitation should be applied on a cumulative basis for each installment period. To clarify, if the partnership's annualized income changes during the year, the NOL deduction that the partnership may take into account can increase or decrease accordingly.

Line 7b – Capital Losses (attach a statement that indicates type and amount – The foreign partner must distinguish short term capital losses from short term capital losses in the attachment.

Line 7f - Other ordinary deductions and losses described in Regulations section 1.1446-6(c)(1)(i) that are subject to partner level limitation –

Line 8 – The amounts of deductions and losses set forth in this certificate have not been set forth in a certificate to another partnership for the same tax year for purpose of reducing withholding under section 1446. –

Line 9 – All of the deductions and losses set forth in this certificate are (or will be) reflected on my income tax returns for a tax year ending prior to the install due date or the close of the partnership tax year for which this certificate will be considered

Line 10 - The deductions and losses set forth in this certificate have not been disallowed by the IRS as part of a proposed adjustment described in Regulations section 601.103(b) or 601.105(b). -

**Part III – Certification under Regulations section 1.1446-6.** –Line 11 - When applicable (see Treasury regulations 1.1446-6(c)(1)(ii)(B)), a foreign partner can represent that its only activity that gives rise to effectively connected income, gain, deduction, or loss is (and will be) during the partner’s taxable year the partner’s investment in the partnership. The partner must make this determination based on the partnership’s taxable year that ends with or within the partner’s taxable year. A partnership that receives this certification from a foreign partner, and that may reasonably rely on such certificate, is not required to pay 1446 tax (or any installment of such tax) with respect to such partner if the partnership estimates that the annualized (or, in the case of a partnership completing its Form 8804, the actual) 1446 tax otherwise due with respect to such partner is less than \$1,000, without taking into account any deductions or losses the partner certified to the partnership or any state and local taxes the partnership withholds on behalf of the partner.

**Part IV – Disclosure Consent and Signature** – Foreign partners should note these are important statements which they are consenting to and certifying under penalties of perjury. The consent section reads

“Consent is hereby given to disclosures of return and return information by the Internal Revenue Service pertaining to the validity of this certificate to the partnership or other withholding agent to which this certificate is submitted for the purpose of administering section 1446.”

This consent gives the IRS authority to contact the partnership or withholding agent directly with questions to ensure processing of the certificate. The foreign partner will receive copies of all correspondence with the partnership or withholding agent.



The second statement is a penalty of perjury statement required by the regulations. It requires the signature of the partner, or its authorized representative, under penalties of perjury, and the date that the certificate was signed.

If a representative of the partner signs and dates the certificate, a power of attorney specifically authorizing the agent to make this representation must be attached to the certificate.